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COMMENTS

EASEMENTS BY WAY OF NECESSITY ACROSS FEDERAL LANDS

Is an easement across federal lands implied when the United States has granted a tract of land to which the grantee would otherwise have no practical means of access? In the recent case of *Bydlon v. United States*,¹ the Court of Claims implied an affirmative answer in holding that the ancient doctrine of ways of necessity applied to Government grants to create access easements by air.

The purpose of this Comment is to determine the validity of that conclusion and the extent to which it may be utilized to give life to dormant easements. Particular attention will be given to the possible existence of such easements across national forest lands.

THE BYDLON CASE

The seed of the *Bydlon* decision was planted in 1949 when the President issued an executive order prohibiting flights of planes at altitudes under 4,000 feet over "roadless areas" of the Superior National Forest in northern Minnesota.² The order effectively deprived owners of prosperous resorts on the Canadian border of the only practical access to their properties, since they were surrounded by international waters to the north and "roadless areas" on all other sides and customarily flew their customers in by seaplane. Ignoring the executive order, they continued to fly customers in at heights under the prescribed minimum. In *United States v. Perko*,³ the Government obtained an injunction against this practice. Grounded, the resort owners sought to obtain access to their properties by self-help. They broke a gate to obtain entrance to a logging road (privately maintained on national forest lands under permit) and attempted to build an extension which would have given them reasonable access by ground. In a second *United States v. Perko*,⁴ the United States obtained an injunction against continuance of these efforts and against their use of motor vehicles within the roadless areas.

¹ 175 F. Supp. 891 (Ct. Cl. 1959).

² Issued by virtue of § 4 of Air Commerce Act of 1926, 44 STAT. 570, repealed 72 STAT. 806 (1958).

³ 108 F. Supp. 315 (D. Minn.), *aff'd* 204 F.2d 446 (8th Cir.), *cert. denied*, 346 U.S. 832 (1953).

⁴ 133 F. Supp. 564 (D. Minn. 1955).

Having thus been denied all practical means of access,⁵ in the *Bydlon* case three of the resort owners sought compensation for depreciation in the value of their resorts, upon the theory that the air is a public highway and the ban on air travel constituted a taking of their right, as abutting owners, to access thereto. The majority of the court adopted the Commissioner's opinion that:

It seems unnecessary to engage in an extended and perhaps profitless discussion of the ownership in, use of and sovereignty over the airspace as between the Federal Government, state governments, and citizens. The right of at least some of the plaintiffs may be considered in the light of the traditional doctrine of ways of necessity.⁶

Finding access by air "necessary" as to two of the plaintiffs, the court awarded damages of \$25,000 and \$30,000 respectively for "taking" of a way of necessity by air.

A brief review of the "traditional doctrine of ways of necessity" will permit a more detailed examination of the court's conclusion.

THE WAY OF NECESSITY DOCTRINE

A way of necessity is an easement which may arise either by implied grant or by implied reservation.⁷ In its simplest form, a way of necessity by implied grant is created when a grantor conveys a tract of land completely surrounded by lands which he retains. Since the granted lands are cut off from access to a public way by the grantor's lands, an easement across those lands is implied.⁸ Conversely, if a grantor retains land completely surrounded by the lands conveyed, an easement in the form of a way of necessity is impliedly reserved across the lands conveyed to enable the grantor to reach a public way.⁹ The doctrine is not, however, limited to such simple situations, since a similar easement may be implied when either conveyed lands or retained lands are inaccessible to a public way because partially hemmed in

⁵ For example, one of the plaintiffs who was allowed to recover was required to make a 41 mile trip involving three and sometimes four land portages between boat trips, two across Canadian soil, requiring customs stops. 175 F. Supp. at 912.

⁶ 175 F. Supp. at 897.

⁷ Care should be taken to distinguish between an easement implied because of necessity and an easement implied because of pre-existing, visible user, a distinction courts frequently fail to make. For an analysis of Washington cases which emphasizes the distinction, see Comment, 26 WASH. L. REV. 125 (1951). *Brasington v. Williams*, 143 S.C. 223, 141 S.E. 375 (1927), contains a short but excellent itemization of various forms of easements, expressly pointing out the distinction. The common law way of necessity should also be distinguished from statutory ways. See note 66 *infra*.

⁸ 3 POWELL, REAL PROPERTY ¶ 410, at 414 (1949) [hereinafter cited as POWELL]; 3 TIFFANY, REAL PROPERTY § 793, at 284 (3d ed. 1939).

⁹ *Ibid.*

by stranger's lands¹⁰ or even though the lands abut on a public way, if physical conditions obstruct access thereto.¹¹

It has been suggested that the doctrine had its origin in the maxim that "anyone who grants a thing to someone is understood to grant that without which the thing cannot be or exist."¹² In social terms, the doctrine is often explained as based on a public policy which favors the full utilization of land,¹³ and, as a corollary, the easement is said to be implied by operation of law.¹⁴ More recently, however, the doctrine has been said to be dependent upon the "presumed intention" of the grantor and grantee.¹⁵ The Washington court has spoken of the doctrine in terms of estoppel.¹⁶ In most situations where a way of necessity is sought, the background of the doctrine is immaterial. In the question of applicability of the doctrine to government grants, however, its basis may be controlling, as will be discussed *infra*.

There are three requisites to creation of a way of necessity:¹⁷ (1) *Unity of title*. It must be shown that at some time in the past the land for the benefit of which the way is claimed (the dominant estate) and that across which it is claimed (the servient estate) belonged to the same person.¹⁸ (2) *Severance of title*. There must have been a severance of the original tract, the owner retaining some portion thereof.¹⁹

¹⁰ *E.g.*, *Davis v. Sikes*, 254 Mass. 540, 151 N.E. 291 (1926) (strangers' lands on three sides).

¹¹ Not all courts permit a way of necessity under the latter circumstances. See not 24 *infra* and accompanying text.

¹² *Simonton, Ways of Necessity*, 25 COLUM. L. REV. 571, 572 (1925). This article traces the doctrine from its beginnings in the fourteenth century.

¹³ *E.g.*, *Condry v. Laurie*, 184 Md. 37, 41, 41 A.2d 66, 68 (1945) ("The doctrine is based upon public policy, which is favorable to full utilization of land and the presumption that parties do not intend to render land unfit for occupancy."); *Buss v. Dyer*, 125 Mass. 287, 291 (1878).

¹⁴ It has been suggested this approach was first taken by Sergeant Williams in a note to *Pomfret v. Riccroft*, 1 Wm. Saund. 321, 323, n. 6, 85 Eng. Rep. 454, 460, n. 6 (1680), 3 POWELL § 410, at 415. 2 THOMPSON, REAL PROPERTY § 533, at 126 (1939), speaks only of creation by "operation of law."

¹⁵ *E.g.*, *Grobe v. Ottmers*, 224 S.W.2d 487, 489 (Tex. Civ. App. 1949) ("A way of necessity arises from a presumption that . . . there was an intention to grant a roadway so as to enable the grantee to have full enjoyment of the property conveyed, and that the failure to grant a passageway was an oversight and will be implied by the grant."). Powell explains this trend as resulting from conceptual difficulties, in the 17th century, in connection with reserved ways, when it was argued that reservation of an easement was inconsistent with the grantor's warranties. 3 POWELL ¶ 410, at 415.

¹⁶ *Schulenburg v. Johnstone*, 64 Wash. 202, 205, 116 Pac. 843 (1911).

¹⁷ *Brasington v. Williams*, 143 S.C. 223, 141 S.E. 375 (1927).

¹⁸ There can be no way of necessity across the lands of a stranger. *Poulos v. Dover Boiler & Plate Fabricators*, 5 N.J. 580, 76 A.2d 808 (1950); *Todd v. Sterling* 45 Wn.2d 40, 273 P.2d 245 (1945).

¹⁹ Numerous cases hold that a subsequent purchaser of the servient estate takes the tract subject to the easement by way of necessity, without regard to whether he has notice of its existence, *e.g.*, *Finn v. Williams*, 376 Ill. 95, 33 N.E.2d 226 (1941) (way implied in 1895 conveyance could be asserted against successor of grantor in 1937);

(3) *Necessity*, existing at the time of the grant.²⁰

The degree of necessity which justifies finding a way of necessity has been one of the most controversial points. It is generally agreed that strict necessity is required to create a reserved way, since the grantor is claiming something in derogation of his deed.²¹ Modernly, courts seem divided as to whether "strict" or "reasonable" necessity²² is required to create an implied way by grant. The question is usually presented in one of two situations.²³ The most common situation is where the claimant has access to a public way over his own lands, but physical conditions obstruct practical use of such access. The modern approach is to apply a test of reasonableness: would the cost of constructing a road on claimant's land exceed the value of the land or be greatly disproportionate thereto?²⁴ In the second situation, the alleged dominant estate abuts on navigable waters. Here, a way is generally denied, courts speaking in terms of "strict" necessity.²⁵

Falcone v. Benjamin, 129 Misc. 143, 221 N.Y.S. 190 (Sup. Ct. 1926). *Contra*, *Backhausen v. Mayer*, 204 Wisc. 286, 234 N.W. 904 (1931). Annot., *Extinguishment of easement by implication or prescription, by sale of servient estate to purchaser without notice*, 174 A.L.R. 1241, 1246 (1948).

²⁰ 3 POWELL ¶ 410, at 421.

²¹ *United States v. Rindge*, 208 Fed. 611, 620 (S.D. Cal. 1913); 2 THOMPSON, REAL PROPERTY § 540, at 136, n. 74 (1939).

²² Early cases sometimes insisted on "absolute" necessity, e.g., *Kipp v. Curtis*, 71 Cal. 62, 11 Pac. 879 (1886), and *Dee v. King*, 73 Vt. 375, 50 Atl. 1109 (1901), both stating that it is only where there is no way through his own land that a grantee can claim a right over that of his grantor. In *Croty v. New River & Pocahontas Consol. Coal Co.*, 72 W.Va. 68, 78 S.E. 233 (1913), it is suggested that in practically all cases making this statement, the claimant was seeking a way which was merely more convenient than that which was available over his own land. All cases agree that mere convenience does not constitute "necessity." 3 THOMPSON, REAL PROPERTY § 546 (1939).

²³ The question as to degree of necessity may also arise as part of the problem of extent of a way where change in use of the dominant estate or developing means of communication or transportation enlarges access requirements. Thus, in the *Bydlon* case the necessity question revolved entirely around use of aircraft. The majority adopted the Restatement view that the limits of privilege of use be measured by uses the parties might reasonably have expected to be made of the dominant estate in its normal development. RESTATEMENT, PROPERTY § 484, comment *b* (1940).

²⁴ See 3 POWELL ¶ 410; 3 TIFFANY, REAL PROPERTY § 794 (3d ed. 1939). It is believed that the test stated in the text covers the variance between "strict" and "reasonable" necessity—it being merely a difference in definition of what constitutes "disproportionate expense," e.g., *Marshall v. Martin*, 107 Conn. 32, 139 Atl. 348 (1927); *Condry v. Laurie*, 184 Md. 317, 41 A.2d 66 (1945) (way will be recognized only in case of "strictest" necessity, but disproportionate expense may create such necessity). *Croty v. New River & Pocahontas Consol. Coal Co.*, 72 W. Va. 68, 78 S.E. 233 (1913), points out that where cost of construction is disproportionate to the value of the land there is as clear a case of necessity as when the land is surrounded by stranger's lands, since in the latter case a right of way could generally be secured if sufficient money were offered to the strangers.

Simonton, *supra* note 12, at 580, criticizes the "strict" necessity view as a "product of 19 century juristic thinking." He suggests that the question be approached from a social interest viewpoint: Is the way sought necessary to enable the owner to have full enjoyment of his land?

²⁵ Annot., *Easements: way by necessity where property is accessible by navigable water*, 38 A.L.R. 1310 (1925). *Contra*, *Feoffees of Grammar School v. Proprietors of*

With this brief outline of the way of necessity doctrine, it is possible to examine the *Bydlon* conclusion in greater detail.

SHOULD THE DOCTRINE APPLY TO FEDERAL GRANTS?

Background. In the *Bydlon* case, discussion of the creation of the easements found was limited to the statement that:

[I]t is the universal rule that the grantee of property hemmed in by the grantor's property has a right-of-way of necessity across the latter, on the rule of public policy that whenever property is conveyed the grantor also conveys by implication whatever is necessary to its beneficial use.²⁶

With this peremptory conclusion, the court chose to ignore prior confusion as to whether and to what extent the way of necessity doctrine applies to government grants.²⁷ The confusion seems to have grown from one poorly reasoned opinion,²⁸ conflicting views as to a government's rights under the doctrine,²⁹ misinterpretation of statements emphasizing the need for *proof* of unity of title,³⁰ and dicta.³¹ Thus, in the most recent case where the question was mentioned,³² the court made the statement: "The right of way of necessity is founded on an implied grant, but no such implication arises from conveyances by the state."³³

Jeffrey's Neck Pasture, 174 Mass. 572, 55 N.E. 462 (1899) (the court finding access by water would not meet the requirements of uses to which the claimant's property would naturally be put).

²⁶ 175 F. Supp. at 898.

²⁷ Six decisions which seemingly hold that the doctrine has no application were cited to the court in the *Bydlon* case. Brief for Government, p. 72. These cases are cited and discussed in notes 28, 29, 30, 31, and 32 *infra* and accompanying text.

²⁸ *Pearne v. Coal Creek Mining & Mfg. Co.*, 90 Tenn. 619, 18 S.W. 402 (1891).

²⁹ *Herrin v. Sieben*, 46 Mont. 226, 127 Pac. 323 (1912); *State v. Black Bros.* 116 Tex. 615, 297 S.W. 213 (1927).

³⁰ In *Bully Hill Copper Mining & Smelting Co. v. Bruson*, 4 Cal. App. 180, 87 Pac. 237, 238 (1906), in refusing to find a way of necessity because there was no showing of a common grantor-grantee relationship, the court properly said: "The mere fact that all of the land was originally part of the public domain and hence owned by a common grantor cannot confer the peculiar right out of which a way from necessity arises." In *Thomas v. Morgan*, 113 Okl. 212, 240 Pac. 735, 737 (1925), where there was no evidence of unity of title, the court said: "In the instant case the evidence shows that the two tracts of land never belonged to the same person, except the government, and an easement cannot operate against the government." It is difficult to see what the court had in mind in making this statement. However, it is clear that a simple allegation of unity of title in the United States is not sufficient; title to the dominant and servient tracts must be traced back to the date of the original grant of the alleged dominant estate, and the requisite necessity established as of that time.

³¹ *United States v. Rindge*, 208 Fed. 611 (S.D. Cal. 1913).

³² *Guess v. Azar*, 57 So.2d 443 (Fla. 1952). The plaintiffs sought passage over defendant's land for commercial purposes—relying on a way of necessity—in addition to passage for home, agricultural, and stock raising purposes provided by statute. Plaintiffs' bill specifically alleged there was no unity of title; hence, there could be no way of necessity.

³³ *Id.* at 445.

Yet in the first American case in which the question of the applicability of the doctrine to federal grants was considered, the court applied the doctrine as a common law incident of all grants meeting the three requisites.³⁴ The case for application of the doctrine was persuasively presented:

The United States being the proprietor of a section of land entirely surrounded by eight other sections, sells the section so surrounded; the purchaser acquires by the common law a right of way to the land he has bought, as a necessary incident of the grant.³⁵

The grantee of one tract . . . can have no access to or egress from his land except by a way over the tracts contiguous to and surrounding it. He has an estate as absolute and unrestricted as that of his neighbors . . . Yet this estate and these rights are but empty names, unless he can get to and from his land, and this he can not do, by a physical necessity, unless by a way passing over those adjoining lands. It would seem to be no more than a principle of natural justice, that this right of way should exist . . . If not a principle of natural law, it is at least one which could not long be omitted in the code of civilized people.³⁶

Forty-three years passed before a court again considered the question. Then in 1891, in *Pearne v. Coal Creek Mining & Mfg. Co.*,³⁷ the Tennessee court concluded that the doctrine did not apply to federal grants. In the *Pearne* case, the plaintiff asserted that a way of necessity had been *reserved* by the United States, at the time of a grant to defendant in 1837, over surrounding public lands subsequently granted to the defendant in 1848. The plaintiff had acquired rights to an inner tract of the first grant prior to 1848. The court rejected application of the doctrine, giving two reasons: (1) that the Government adequately provided for maintenance of public roads "penetrating every neighborhood, and sufficiently numerous to meet the general wants of all her citizens," and (2) that:

It would be ruinous to establish the precedent contended for, since by it every grantee, from the earliest history of the state, and those who succeed to his title, would have an implied right of way over all surrounding and adjacent lands held under junior grants, even to the utmost limits of the state.³⁸

The fact that the easement claimed was in the form of an implied reservation was not discussed.

³⁴ *Snyder v. Warford*, 11 Mo. 328, 49 Am. Dec. 94 (1848).

³⁵ 11 Mo. at 329, 49 Am. Dec. at 95.

³⁶ *Id.* at 330, 49 Am. Dec. at 96.

³⁷ 90 Tenn. 619, 18 S.W. 402 (1891).

³⁸ 18 S.W. at 404.

A later Montana decision, *Herrin v. Sieben*,³⁹ also ignored any possible distinction. The court found an implied reservation of a way not only in favor of the United States, but in favor of private citizens desiring to go upon hemmed in public lands for any proper purpose. "A contrary view," said the court, "would vest in the [owners of the servient estate] . . . a monopoly of all the public lands within the limits of the grant."⁴⁰ This reasoning, of course, fails to take into account the absolute power of the United States to condemn necessary ways for its own purposes and those of its citizens. Forty-five years later the Montana court, presented with assertion of a reserved way in connection with a private grant, expressly overruled the *Herrin* conclusion to the extent it recognized ways of necessity by reservation or grant where such ways could be obtained through eminent domain proceedings.⁴¹

In *State v. Black Bros.*,⁴² a 1927 Texas decision, the power of a government to condemn necessary ways was the basis of a conclusion that the state could not assert a reserved way across granted lands. In that case, the state of Texas and holders of a state permit to prospect for petroleum in a river bed were denied a right of way over defendant's lands which hemmed in the river bed, the court saying:

This court has strongly emphasized that strict necessity is the basis for any such right as that here asserted. The same necessity does not exist in the case of the sovereign as in the case of the individual landowner. As long as the title remains in the state . . . there can be no doubt that the state, in the exercise of the power of eminent domain . . . can obtain any and all reasonable rights of way.⁴³

In the one federal decision which has previously considered the question, *United States v. Rindge*,⁴⁴ the United States asserted reserved rights of way over 13,000 acres previously granted to the

³⁹ 46 Mont. 226, 127 Pac. 323 (1912).

⁴⁰ 127 Pac. at 328. The plaintiff had acquired railroad grant sections intermingled with public land sections. Plaintiff sued for trespass when defendants drove cattle over plaintiff's lands to reach public lands open to grazing and otherwise inaccessible. The court held defendants had a right to pass over plaintiff's lands by virtue of a reserved way of necessity.

Despite subsequent criticism of this decision, the writer believes the "monopoly" reasoning to be a particularly persuasive argument for recognition of applicability of the doctrine in favor of the grantees of federal grants.

⁴¹ *Simonson v. McDonald*, 131 Mont. 612, 311 P.2d 982 (1952). In the *Simonson* case, eminent domain was available through a constitutional provision declaring private roads leading from highways to residences or farms and temporary logging roads to be "public uses." Since the plaintiff's requirements fell within this definition, the court refused to find an implied reservation of a way across defendant's lands.

⁴² 116 Tex. 615, 297 S.W. 213 (1927).

⁴³ 297 S.W. at 218.

⁴⁴ 208 Fed. 611 (S.D. Cal. 1913).

defendant, on behalf of settlers desiring to reach public lands open for settlement. The public lands were located between the defendant's ranch to the south and steep mountains and canyons to the north. After holding on two valid grounds that the requisites of a way of necessity were not met,⁴⁵ the court speculated at length on the question of applicability of the doctrine to government grants, concluding: "It is, in my judgment, very doubtful whether the doctrine of implied ways of necessity has any application to grants from the federal government, under the public land laws."⁴⁶

Although no English case directly considering the question was found, at least one decision infers that the doctrine applies to Crown grants, in the statement that: "The doctrine of a way of necessity is only applied to a title by grant, personal or *Parliamentary*." [Emphasis added.]⁴⁷

This, then, was the state of the law when the United States argued to the Court of Claims in the *Bydlon* case that the way of necessity doctrine does not apply to government grants: one case had clearly held that the doctrine applies in favor of the grantee,⁴⁸ one case had held that the doctrine does not apply in favor of a government,⁴⁹ one case (subsequently reversed) had held that the doctrine does apply in favor of the United States,⁵⁰ and a miscellaneous collection of cases contained loose language and dicta inferring that the doctrine should not apply in either case.

Conclusions: Implied Grant. Writers who have considered the question have argued that there is no valid reason why the doctrine should not apply to government grants.⁵¹ It is difficult to escape the

⁴⁵ Actual grounds of the decision were that (1) strict necessity did not exist since it was possible to construct roads through the mountains to the north, although it would be expensive, and (2) neither a grantee nor a grantor can subdivide his land and sell off portions in such a manner as to create additional ways of necessity not required at the time of the initial grant.

⁴⁶ 208 Fed. at 619, citing *Pearne*, note 37 *supra* and accompanying text, and *Bully Hill Copper Mining & Smelting Co. v. Bruson*, note 30 *supra*.

⁴⁷ *Wilkes v. Greenway*, 6 T.L.R. 449 (1890) (holding that a way of necessity must arise from a grant and, therefore, cannot exist where the alleged dominant estate was acquired by adverse possession).

⁴⁸ *Snyder v. Warford*, note 34 *supra* and accompanying text.

⁴⁹ *State v. Black Bros.*, note 42 *supra* and accompanying text.

⁵⁰ *Herrin v. Sieben*, notes 39, 40 *supra* and accompanying text.

⁵¹ "The public policy favoring land utilization applies to these cases as well as to those in which such easements by necessity are found on the basis of an original unity of ownership in a private person." 3 POWELL ¶ 410, at 422-423.

"It is not entirely clear why a conveyance by the government should be subject to a different rule in this respect from a conveyance by a private individual. The same intention may well be imputed to it as to an individual, not itself to hold or to vest in another land which cannot be utilized for lack of a means of approach, and the

logic of this view—at least as to the implied *grant* of a way of necessity.

The early policy of the United States in disposing of public lands was directed toward free and full utilization of lands.⁵² At the time of the earlier grants, there were no limitations upon free passage over the public domain.⁵³ It was not until the United States adopted the policy of setting aside large areas of public lands as reserves for diverse purposes that any serious difficulty arose as to a right to pass over public lands.⁵⁴ Thus, there is every reason, historically, to apply the doctrine in favor of the grantee and his successors, even though the grantor is the federal government and the servient estate is owned by the United States.

Close examination of the reasoning advanced for non-application reveals the shifting basis upon which it rests.⁵⁵ A moment's reflection suggests the inconsistency of the two reasons advanced in the *Pearne* case:⁵⁶ To the extent public roads have been established, there is no occasion for continuance of a way of necessity;⁵⁷ hence, the "ruinous network" which was envisioned would diminish in direct proportion to growth of a network of public highways. The reasoning is even less persuasive now than at the time advanced. The extensive highway

same considerations of public policy in favor of the utilization of the land apply in both cases." 3 TIFFANY, *REAL PROPERTY* § 793, at 290 (3d ed. 1939).

For a more extended consideration of the question, see Simonton, *supra* note 12, at 579.

⁵² The period from 1810-1925 has been called the "era of disposal," when the chief concern was to "get federal lands into the hands of the nation's citizens without too much regard for process or results." CLAWSON & HELD, *THE FEDERAL LANDS: THEIR USE AND MANAGEMENT* 17 (1957).

⁵³ It was not until 1866 that it was thought necessary to have statutory confirmation of a public right of passage. In that year, Congress adopted a statute providing: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." REV. STAT. § 2477 (1875), 43 U.S.C. § 931 (1934).

⁵⁴ The first major reservation from the public domain was Yellowstone National Park in 1872, REV. STAT. § 2474 (1875), 16 U.S.C. 21 (1934). Provision for forest reserves (now, national forests) was first made in 1891, 26 STAT. 1103, now codified as the first paragraph of 16 U.S.C. § 471 (1934).

The early history of forest reserve policy suggests attempts to deny right of passage, e.g.: "Living near the border of this great forest reserve, acquainted as I am . . . with the unfortunate citizens who are denied access to their little holdings because they lie within the fated boundaries of this omnivorous reserve . . . They hold the Government patents for their lands, yet they are denied access to their property by the bayonets of the Government which conveyed the title." 30 CONG. REC. 1007-08 (1897) (remarks of Senator Castle).

⁵⁵ Simonton, *supra* note 12, at 579, suggests that "some remnant of the prerogative of the sovereign" might lie behind rejection of its application, but this reason has never been suggested in decisions.

⁵⁶ Note 38 *supra* and accompanying text. The same reasoning was repeated in the dicta of the Rindge case, 608 Fed. at 619.

⁵⁷ It is the almost universal rule that a way of necessity ceases to exist when the necessity ceases to exist, i.e., when other access to a public road becomes available. *Whitfield v. Whittington*, 99 A.2d 196, 198 (Del. 1953); *Kux v. Chandler*, 112 N.Y.S.2d 141 (Sup. Ct. 1952) (contrasting express and implied easements in this regard); 3 TIFFANY, *REAL PROPERTY* § 819 (3d ed. 1939).

system "penetrating every neighborhood" is now much nearer reality. In remote areas where, as a glance at any road map will emphasize, there is no such network, the fact that private lands are owned in large tracts—rarely less than sections—eliminates the need for the myriad ways suggested. There is, therefore, no need to perpetuate the *Pearne* concern as to a complex network of dormant ways of necessity.

The only other reason advanced by the dicta of the *Rindge* decision was: "The public domain is disposed of under general laws, and the rights conferred and reserved are defined by such laws, and rules and regulations made in pursuance thereof."⁵⁸ In considering the validity of this argument, it is necessary to review the suggested bases of the doctrine.

If, as suggested by the earlier cases, the doctrine arose as a result of the maxim that a grant includes all that is necessary to the enjoyment of the grant, there would seem to be no room for reference to the terms of a federal grant. Similarly, viewing a way of necessity as arising by "operation of law" as a common law incident of any grant requiring such a way for full utilization of the land granted, it would seem its creation by a government grant could be negated only by express legislation.

Only if the way is viewed as arising from "presumed intent" is it possible to argue that the grant is limited to the express terms of the granting legislation. It is frequently stated that grants by the United States are to be strictly construed against the grantees, and that nothing passes unless expressed in clear language.⁵⁹ Even this rule of construction is qualified: "Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear,"⁶⁰ and "the construction should be such as will effectuate the legislative intention, avoiding, if possible, an unjust or absurd conclusion."⁶¹ Even though it be conceded that the basis of the doctrine is the "presumed intent" of the parties, it is difficult to conceive of a right which could arise more clearly by implication than under a doctrine universally recognized since the fourteenth century.⁶²

⁵⁸ 208 Fed. at 619.

⁵⁹ *E.g.*, *Pearsall v. Great No. Ry.*, 161 U.S. 646, 664 (1895).

⁶⁰ 161 U.S. at 664 [Emphasis added.].

⁶¹ *United States v. Oregon & Cal. R.R.*, 164 U.S. 526, 539 (1896).

⁶² The Washington court has said: "The right to use the way as a private way of necessity finds its support in the doctrine of estoppel . . ." *Schulenbarger v. Johnstone*, 64 Wash. 202, 205, 116 Pac. 843 (1911). Under such an approach it might be possible to argue that the doctrine should not apply to Government conveyances because estoppel does not operate against the United States. *Cf.* *United States v. California*, 332 U.S. 19, 40 (1947).

Conclusions: Implied Reservation. A more difficult question is presented when the applicability of the doctrine to create implied *reservations* of ways by the United States is considered. In the *Black Bros.* case,⁶³ the Texas court held that the state government could not assert a right to a reserved way because it had power to condemn the way sought; hence, the requisite strict necessity was missing. The court limited its decision thus: "*As long as title remains in the state . . . there can be no doubt that the state, in the exercise of the power of eminent domain . . . can obtain any and all reasonable rights of way.*" [Emphasis added.] It is difficult to determine from this reasoning whether the court intended to hold that the government's power to condemn prevented *creation* of a reserved way or, merely, *assertion by the government* of a right to the advantage of a reserved way. The statement that the requisite necessity was missing suggests the former, while its further limitation as to lack of necessity "as long as title remains in the state" suggests the latter.

Assuming that the court intended to hold that the government-grantor's power to condemn prevented creation of a common law way of necessity, the reasoning is subject to criticism. As previously discussed, the question of degree of "necessity" arises only when the alleged dominant estate is not entirely hemmed in by lands granted or retained. "Necessity," in this sense, should not be a factor in determining general applicability of the doctrine to government grants. Rather, consideration of its applicability should be approached with the question: Do the suggested bases of the doctrine justify recognition of a reserved way in favor of a government-grantor?

The earliest view that a grant includes all that is necessary to its enjoyment, and hence, an access right, recognized no reserved way. Extension of the doctrine to create reserved ways was justified by the social view that all land should be fully utilized. If the circumstance of the United States as grantor and as owner of retained lands lacking access except over granted lands is viewed as of the time of the grant producing this situation, its power to condemn necessary ways permits full utilization of the retained lands. In this sense there is no "strict necessity" for the doctrine, and it can be argued that it therefore has no application. The fact that the United States would be claiming a right of way over granted lands in derogation of its grant adds force to this argument.

The objection to a claim by a grantor in derogation of his grant,

⁶³ Note 42 *supra* and accompanying text.

inherent in a doctrine of easements reserved by implication, was met by seventeenth century courts by the fiction of "presumed intent." Using this approach in testing the applicability of the doctrine of ways of necessity in favor of the United States as a grantor, the existence of a power to condemn necessary ways is a more convincing explanation of failure expressly to reserve necessary ways than is the suggestion that a knowledgeable conveyor of land like the United States "overlooked" its future access problems. This reasoning is persuasive, but only if the basis of the doctrine is the "presumed intent" of the parties. It has been suggested, however, that the fictional implication of "intent" is actually rooted in society's interest in land utilization.⁶⁴

Returning to the basic justification for the doctrine—full utilization of land—the argument that the government can fully utilize retained land through its power to condemn necessary ways loses its force if one looks beyond retention of the lands by the Government. Once the title to the retained tract passes to a private individual, the absolute power to condemn is gone. Absent a right to condemn under a private constitutional or statutory power, the subsequent grantee would hold title to a wholly useless piece of land. If full utilization of land is justification for the doctrine, its application should extend to cover this eventuality. Therefore, it seems incorrect to conclude that the government's power of eminent domain negatives creation of a reserved way.

The alternative view of the reasoning of the *Black Bros.* court—that a reserved way may be created in favor of a tract of land retained by the United States, but that the Government cannot assert a right to such reserved way—overcomes this objection. Subsequent grantees of the United States, under this approach, could assert a right to the reserved way. It would be necessary to argue that the "necessity" for the reserved way lies dormant while the title remains in the government, just as it may lie dormant when the grantor or grantee has access, at the time of the grant, through a permissive use of stranger's lands.⁶⁵ The ultimate result of this reasoning is persuasive. The reasoning, however, introduces complications beyond the scope of this Comment.⁶⁶

⁶⁴ 3 POWELL ¶ 410, at 416; Simonton, *supra* note 12, at 579.

⁶⁵ See *Finn v. Williams*, 376 Ill. 95, 33 N.E.2d 226 (1941). The original grantee of the dominant estate and his successors had been permitted access over land owned by surrounding strangers for 42 years. This permission was denied plaintiffs, and the court held that they could avail themselves of the dormant easement implied in the deed severing the dominant and servient estates.

⁶⁶ For example, would a subsequent grantee of the Government be denied a right to assert the reserved way if he could obtain a way under a private constitutional or statutory condemnation proceeding? Such provisions are fairly common, *e.g.*, Wash.

The writer's own views can perhaps be best summarized by the arbitrary conclusion that the United States should never be able to circumvent condemnation proceedings by utilizing a doctrine designed for the protection of private landowners.

Regardless of what one's view may be as to the applicability of the doctrine of ways of necessity to create reserved ways for the benefit of the United States, it seems clear that the doctrine should apply for the benefit of lands granted by the Government.

CURRENT APPLICATIONS

Accepting the applicability of the doctrine of ways of necessity in favor of grantees of past federal grants, and their successors, what would be the scope of application currently?

Early policy of the United States in disposing of the public domain in numerous and frequently isolated tracts⁶⁷ suggests that, initially,

Const. art. I, § 16; RCW 8.24.010 (1913) (providing for condemnation of a way across neighboring lands when necessary for ingress and egress for "proper use and enjoyment of land"). This question leads to interesting speculation as to the effect of such private condemnation procedures upon the common law way of necessity doctrine generally. Are they a substitute for the common law doctrine, or merely a supplement to fill the voids left by the common law doctrine? In *Simonson v. McDonald*, 131 Mont. 612, 311 P.2d 982 (1952), the court broadly concluded that a common law way of necessity, whether by reservation or grant, could not be asserted where a way could be obtained in eminent domain proceedings. In effect, it ruled that the constitutional procedure is a substitute for the common law doctrine. The same view seems to have been shared by the early Washington court. In *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681 (1903), it held that the then statutory provision implementing the constitutional language was applicable only in those situations where a common law way of necessity existed. *State ex rel. Mountain Timber Co. v. Superior Court*, 77 Wash. 585, 137 Pac. 994 (1914), in construing the present statute, RCW 8.24.010, reversed the Healy conclusion and held that the term includes all "necessary private ways," i.e., across lands of a stranger as well as across lands which can be traced to a common grantor. This still leaves unanswered, in Washington, the question of whether a common law way of necessity may arise or be asserted across the lands of a grantor or grantee despite the availability of the statutory condemnation procedure. Moreover, it is not clear that the statutory procedure is available to one who attempts to condemn a way across stranger's lands when he has a common law way of necessity across his grantor's land. The question was presented in *State ex rel. Carlson v. Superior Court*, 107 Wash. 228, 181 Pac. 689 (1919), but condemnation was denied on other grounds.

The Utah court originally followed the view that a private right to condemn is a substitute for the common law way of necessity, in *Alcorn v. Reading*, 66 Utah 509, 243 Pac. 922 (1926), where a reserved way of necessity was denied. In *Adamson v. Brockbank*, 112 Utah 52, 185 P.2d 264 (1947), however, this conclusion was reversed, at least as to ways by implied grant, the court concluding that the availability of the statutory procedure "might" be a factor to consider in determining the "necessity" for an easement.

Assuming that such private condemnation procedures may be a substitute for the common law way of necessity, they are of no assistance to owners of tracts hemmed in by federal lands, since federal lands cannot be condemned. The area of access over federal lands is therefore the area in which the common law doctrine retains its most vital significance.

⁶⁷ For example, two major means of disposing of public lands to private individuals were through pre-emption and homestead. Under the pre-emption method, one who settled on 160 acres of land, improved it, and erected a dwelling acquired a preferen-

numerous ways to public roads did arise. With the growth of our present extensive highway system, it would seem few areas remain (outside of large land holdings in remote locations) in which the right to such dormant easements could be asserted.⁶⁸ One such area, however, has particular current importance in the state of Washington: access rights of private owners lacking practical ingress and egress except over federal lands, particularly national forest lands.⁶⁹

An 1897 statute⁷⁰ has been the basis of an assumption by Forest Service officials⁷¹ that permits to cross national forest lands must be granted to all persons owning land within the exterior borders of such reservations.⁷² This assumption came under fire in 1956 in a House Committee Report on Federal Timber Sales Policies.⁷³ The Committee found no such statutory requirement as to unoccupied lands and saw in the assumption a stumbling block to efforts of the Federal Service to obtain access rights across certain private property within the boundaries of national forests. Its view was that owners of such property could frequently be forced to grant reciprocal rights-of-way in return

tial right to purchase. Act of May 20, 1862, ch. 75, § 1, 12 STAT. 392, *repealed*, 26 STAT. 1097 (1891). Homestead grants also cover 160 acres, requiring occupation and cultivation for five years. 26 STAT. 1097 (1891), 43 U.S.C. 161 (1926). Large portions of the public domain were granted to railroads to stimulate railroad construction. Such grants often consisted of odd-numbered sections along the railroad, usually five miles on each side. 3 TIFFANY, REAL PROPERTY § 943 (3d ed. 1939). Since the United States, initially, retained the even-numbered sections, this method of grant created the classic situation where the way of necessity doctrine would ordinarily apply.

⁶⁸ Yet in each case where a right to cross another's lands is asserted, there is always the possibility that the two tracts of land involved can be traced back to an early federal grant wherein the requisites of a way of necessity were present. As to the effect of the availability of the power to condemn a way under a private way of necessity statute, see note 66 *supra*.

⁶⁹ Approximately 35% of the land in the state of Washington is federally owned. Of this total, almost ten million acres are national forest lands managed by the Forest Service under the Secretary of Agriculture. CLAWSON & HELD, *THE FEDERAL LANDS: THEIR USE AND MANAGEMENT* 38, 403 (1957).

⁷⁰ "Nothing [herein] . . . shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of national forests, or from crossing the same to and from their homes . . . under such rules and regulations as may be prescribed by the Secretary of Agriculture." 30 STAT. 36 (1897), 16 U.S.C. § 478 (1934).

⁷¹ House Comm. on Government Operations, *Federal Timber Sales Policies*, H.R. Rep. No. 2960, 84th Cong., 2d Sess. 12 (1956) [hereinafter cited as 1956 House Comm. Report].

⁷² "[T]his office has informally expressed the view that the right of ingress and egress which is held by owners of lands within the national forests is recognized by statute and is not a permissive right dependent upon the discretion of the Secretary of Agriculture." Excerpt from letter by Robert L. Farrington, General Counsel for U. S. Department of Agriculture, reprinted, *Joint Hearings Before Special Subcommittee on the Legislative Oversight Function of the Committee on Interior and Insular Affairs, U.S. Senate, and the Subcommittee on Public Works and Resources of the Government Operations Committee, House of Rep.*, 84th Cong., 1st Sess., pt. 2, at 1455 (1955).

⁷³ 1956 House Comm. Report 12.

for a permit to cross national forest lands.⁷⁴ Its recommendation was that the Forest Service adopt a policy of conditioning rights-of-way and road-use permits upon grant of reciprocal rights.⁷⁵

A bill designed to implement this recommendation has been introduced in the Senate.⁷⁶ This bill places in the Secretary of Agriculture almost unlimited discretion to grant easements in return for "adequate compensation, to be determined by the Secretary," and to condition rights-of-way and lesser access rights "as he may deem appropriate."⁷⁷

Should this bill be passed, what would be the status of private owners of land whose only practical access is over national forest lands? If they own lands over which the Forest Service desires access, they could be forced to bargain for access rights. A refusal to accede to the demands of Forest Service officials would mean that they could be deprived of access to and use of their property. It should be noted that the bill make no distinction between those who own bare lands and those who have invested substantial sums in building roads on their lands. It does not limit demands for reciprocal rights to a mere right-of-way, but would permit conditioning of access rights over national forest lands upon use of entire private road systems.⁷⁸ The ultimate effect of the pending bill, then, is to give the Forest Service power to acquire, through its control of access rights, an interest in the private owner's property, including roads and other improvements, which it could otherwise acquire only through condemnation proceedings, in which the land owner's right to compensation is judicially protected.

The coerced granting of such reciprocal rights by private land-

⁷⁴ *Ibid.* The Committee also recognized that condemnation was a proper means for securing access in such situations and that federal agencies had failed to make effective use of condemnation.

⁷⁵ *Id.* at 13.

⁷⁶ S. 1797, 86th Cong., 1st Sess., introduced April 27, 1959, referred to Committee on Agriculture and Forestry, April 27, 1959, 105 Cong. Rec. 6056 (daily ed. April 27, 1959); referred to Subcommittee No. 1, April 28, 1959, Legislative Calendar No. 8, Committee on Agriculture and Forestry, September 24, 1959, at 23; Docket No. 102.

⁷⁷ S. 1797 §§ 1(c) and 3 respectively.

⁷⁸ It should be noted that even though it be held that the United States is entitled to reserved ways under the proper circumstances, the demands which could be made under the pending bill far exceed the rights to which it would be entitled under the way of necessity doctrine. First, a way of necessity is limited to a bare right of passage and, absent agreement of the owner of the servient estate, would not extend to the use of the whole of an established road system. Second, it is the privilege of the owner of the servient estate to designate the course. *Missouri-Kansas-Texas Ry. v. Cunningham*, 273 S.W. 697 (Tex. Civ. App. 1925). Only if he fails to do so, or selects an impracticable or impossible route, does the owner of the dominant estate have the right to select the route. *Brasington v. Williams*, 143 S.C. 223, 141 S.E. 375 (1927). As to location of the route generally, see Annot., *Locating easements of way of necessity*, 68 A.L.R. 528 (1930).

owners cannot be imposed as a condition of recognition of a way of necessity. Where the owner of lands intermingled with national forest lands, or a predecessor in title, acquired those lands through a grant from the United States, he should not be forced to bargain for a necessary way if the circumstances of the grant created an easement as a matter of right. The proposed bill expressly recognizes that pre-existing easements cannot be thus conditioned.⁷⁹

The pending bill, if adopted, would produce one noteworthy result in connection with common law ways of necessity: It would seem to negate application of the doctrine to future grants of lands intermingled with federal lands under the jurisdiction of the Secretary of Agriculture.

Should the bill fail to pass, it cannot be predicted whether the Forest Service will attempt to condition access permits upon the granting of reciprocal rights by private owners. The House Committee recognized no statutory requirement for the granting of such access permits and strongly recommended this approach, even without implementing legislation.⁸⁰ Such a policy has been maintained by the Bureau of Land Management for several years, in connection with O and C lands in Oregon.⁸¹ It is therefore possible that the Forest Service will be forced to follow its lead. Disregarding possible inaccuracy of the Committee's conclusion as to statutory access rights, it is clear that such conditions cannot be imposed upon access rights where a common law easement by way of necessity exists.

CONCLUSION

The Court of Claims has taken a small step toward eliminating previous uncertainty as to the applicability of the doctrine of ways of necessity to federal land grants. It is to be hoped that the logic and justice of the *Bydlon* decision will lead ultimately to further clarification of the rights of owners deprived of free access to their properties by ever-changing federal land management policies.

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⁷⁹ S. 1797 § 6 provides that the bill not be construed to invalidate or modify existing easements.

⁸⁰ 1956 House Comm. Report 12-13.

⁸¹ 43 C.F.R. 115.162. "O and C lands" are approximately 2½ million acres originally granted in aid of construction to the Oregon and California Railroad Company. Beginning in 1908, action was taken to have the grant forfeited for violation of its terms and the lands were ultimately returned to the United States. CLAWSON & HELD, *THE FEDERAL LANDS: THEIR USE AND MANAGEMENT* 32 (1957). The O and C lands therefore present the converse of the usual intermingled ownership pattern: the private owner holds the lands originally retained by the government, while the government has reacquired the originally granted lands.